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SUPREME COURT
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No. 53

In the Supreme Court of the United States

OCTOBER TERM, 1952

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 3053-94) is reported at 193 F. 2d 782. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 283-298, 50-161) are reported in 86 NLRB 951.

JURISDICTION

The decree of the Court of Appeals (R. 3095) was entered on February 11, 1952. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether it is an unfair labor practice under Section 8 (b) (6) of the National Labor Relations Act for a union to require an employer to pay an employee for the actual performance of work if the work done has no value from the employer's standpoint.

2. Section 8 (b) (1) (A) of the National Labor Relations Act prohibits a labor organization from restraining or coercing employees in exercising the right to refrain from union activity, with the proviso that this section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The question presented is whether, in view of the proviso, a union may require, as a condition of remaining in the union, that its members comply with a union policy which has an unlawful purpose.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. IV, 141, *et seq.*), Sections 8 (b) (6) and 8 (b) (1) (A), are set forth in the appendix to petitioner's brief.

STATEMENT

I. *The Alleged Violation of Section 8 (b) (6) of the National Labor Relations Act*

Section 8 (b) (6) of the National Labor Relations Act provides that it shall be an unfair labor practice for a labor organization or its agents:

> to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

The subject matter of the alleged violation of this section is the payment to printers for the reproduction of advertising matter which the employer ordinarily does not use.

Such reproduction operates as follows: An advertiser arranges to have transmitted to a newspaper advertising matter, usually in the form of a matrix, which has been prepared in the composing room of another local newspaper or commercial printing shop (R. 143-144). A plate is then made from the matrix and the advertisement is directly run off on the presses as a part of the published paper (R. 144). Thereafter, the newspaper's printers, in their spare time or when not pressed with other work, use a tear sheet of the advertisement to reproduce it, going through the same steps they would take had they prepared the original advertisement for printing (R. 144). Although upon rare occasions this reproduction or "bogus" matter

is used when an advertisement is re-run, it is not intended to be put to use when made (R. 144). The type, instead, is thrown into what is known as the "hell box" and melted for reuse (R. 144; 1346-1347).

Time spent by printers on reproduction is equivalent to about 5 percent of their total work time (R. 147, 293). As a result of the time spent on reproduction work, publishers may have to hire extra printers, but the extra printers are not hired to do merely the reproduction work (R. 114, 156, n. 90).

Since before the turn of the century, the collective bargaining agreements between the International Typographical Union (ITU) and newspaper publishers have provided for the performance of reproduction work, and the practice was introduced without the resistance and sometimes with the encouragement of the publishers (R. 145-146). Reproduction has generally been regarded by the publishers as an item to be traded off in negotiations against other items of wages and hours (R. 146-147). Although reproduction has uniformly been a demand made by the ITU at the bargaining table, resistance to it by the publishers in the three localities where it was put in issue did not reach the stage of an impasse, and therefore the record does not show what pressure, if any, the ITU would have exerted to require the retention of reproduction (R. 146-147, 148-150, 156).

The complaint alleging the reproduction practice as a violation of Section 8(b)(6) was dismissed by the Board on three independent grounds (R.

297-298, 293-294, 150-157):—(1) Reproduction was work actually done by the printers, who were regular employees devoting most of their time to printing required by the publishers, and therefore reproduction was not in the class of "services which are not performed or not to be performed" (R. 150-156). (2) Assuming *arguendo* that the work done must be beneficial to the employer to satisfy Section 8(b)(6), payment for reproduction work is nevertheless not "in the nature of an exaction" within the meaning of the section, because "payment for reproduction work" represents "an integral part of the wage structure of workers already standing in a proximate employer-employee relationship, not unlike a guaranteed weekly or annual wage arrangement, which is generally recognized as a legal demand, although it may and often does in any given situation, involve payment for non-productive time" (R. 294). (3) A demand made by a union in bargaining, which is accepted by an employer in trade for concessions on other matters and which is unaccompanied by the need to apply pressure to gain its acceptance, is not sufficient to show that a union does "cause or attempt to cause an employer" to make a payment "in the nature of an exaction" (R. 156-157).

The court below affirmed the order of the Board dismissing the complaint alleging a violation of Section 8(b)(6) of the Act (R. 3057, 3075, 3083-85). It held that "the only practice covered by 8(b)(6) was the practice of demanding money where no *work* has been done," and in this case,

"while the 'bogus' was not ordinarily used by the employer, the necessary work to compose it was actually done by the employee" (R. 3085). The court observed, in addition, that "the pay for 'setting bogus' was only for the time the employee actually worked in setting the 'bogus', amounting to approximately five per cent of his total working time. He was a regular employee, not hired merely to set 'bogus', but hired to do composition work which the employer required" (R. 3085).

II. *The Alleged Violation of Section 8(b)(1)(A) of the Act*

Section 8(b)(1)(A) of the Act provides that it shall be an unfair labor practice for a labor organization or its agents:

> to restrain or coerce employees in the exercise of the rights guaranteed in section 7: *Provided*, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein

Section 7 of the Act guarantees employees the right to refrain from union activity or membership.

The Board found that, in order to retain closed-shop conditions in the composing rooms of the newspaper publishers, the ITU directed its subordinate local unions to follow a collective bargaining policy which would permit them to remain contractually free to strike if a publisher hired a non-

union printer (R. 284-287).[1] To enforce this policy, the ITU was empowered to expel any member who failed to adhere to it (R. 57, 59).

The complaint as construed at the hearing alleged that, because expulsion from union membership entailed loss of economic benefits such as mortuary and pension funds, enforcement by the ITU of membership rules to further an unlawful policy restrained and coerced employees in their right to refrain from union activity in violation of Section 8(b)(1)(A) of the Act (R. 287-288, 289-290). The Board dismissed the complaint in this respect, holding that by the proviso to Section 8(b)(1)(A) "Congress unmistakably intended to, and did, remove the application of a union's membership rules to its members from the proscriptions of Section 8(b)(1)(A), irrespective of any ulterior reasons motivating the union's application of such rules or the direct effect thereof on particular employees" (R. 290, 139-140). The court below affirmed the order of the Board dismissing this part of the complaint (R. 5082-83). It held that, by the limitation on Section 8(b)(1)(A) contained in the proviso, "Congress left labor organizations free to adopt any rules they desired governing membership in their organizations.

[1] A fuller description of the ITU policy and its effectuation will be found in the Board's brief in opposition to the ITU's petition for certiorari in No. 56, this Term, in which the ITU seeks review of the Board's findings of violations of Sections 8(b)(1)(B), (2) and (3) of the Act arising out of the adoption and application of the ITU policy.

Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as § 8(b)(1)(A) is concerned" (R. 3083).

DISCUSSION

1. The court below held that the prohibition of Section 8(b)(6) is not violated if the payment demanded was for work actually done; it rejected as immaterial whether the work performed was useful to the employer. On the other hand, in *Gamble Enterprises, Inc.* v. *National Labor Relations Board*, 30 LRRM 2093 (C.A. 6, May 9, 1952), where a union requested a theater to hire a local orchestra to play music on certain occasions, the Court of Appeals for the Sixth Circuit held that an offer to perform work regarded by the employer as unnecessary violated the requirement of Section 8(b)(6). While the decision below pertained to work done by employees already in the employer's hire, whereas the *Gamble* decision pertained to workers seeking employment in order to perform work, the distinction between present and prospective employees is not the basis for the Sixth Circuit's decision, and we believe the distinction is irrelevant to the question whether Section 8(b)(6) requires consideration of whether the work performed was beneficial to the employer. In addition, while the Board in this case stated alternative grounds which are sufficient to sustain its decision (*supra*, p. 5), the court below did not reach those grounds in affirming the Board. We therefore agree with petitioner (Pet., p. 12, n. 8) that the decision below and the *Gamble* decision are in conflict.

Furthermore, in *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 912-913 (C.A. 2), which affirmed the Board's decision that it was no violation of Section 8(b) (6) for a union to demand that an employer pay an employee for wages he lost because of a wrongful denial of employment, the Court of Appeals for the Second Circuit, expressly following the decision below, accepted as basic to Section 8(b)(6) that it reaches only the type of practice where the payment demanded is unrelated to the actual doing of work. Because of the conflict between the decision below and *Gamble*, the conflict in principle between *Gamble* and *Rabouin*, and the widespread importance of the question in the administration of Section 8(b)(6), the Solicitor General on behalf of the Board intends to file a petition for a writ of certiorari to review the *Gamble* decision. In that petition we shall state our reasons for believing that the decision below is right and the *Gamble* decision wrong. Accordingly, we do not oppose the grant of the petition in this case limited to the question of the interpretation of Section 8(b)(6).

2. We do, however, oppose review of the question pertaining to the alleged violation of Section 8 (b) (1) (A) of the Act. That question is wholly distinct from the Section 8 (b) (6) question and at no point do they present any overlapping considerations which should be weighed together.

Petitioner contends that it is a violation of Section 8 (b) (1) (A) for a labor organization to enforce, by expulsion from membership, a rule which

requires a member to adhere to a union policy which has an unlawful purpose. This contention has no merit.

Although forbidding restraint and coercion of employees by unions, the proviso to Section 8 (b) (1) (A) is explicit that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." Because the sponsors of Section 8 (b) (1) (A) did not intend "to affect at least that part of the internal administration which has to do with the admission or the expulsion of members" (93 Cong. Rec. 4271), Senator Holland introduced the proviso to "make it clear that the pending amendment would have no application to or effect upon the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership" (93 Cong. Rec. 4272). Senator Ball who sponsored Section 8 (b) (1) (A) agreed to incorporating the proviso, explaining that "It was never the intention of the sponsors . . . to interfere with the internal affairs or organization of unions," and adding that the union "can expel [a member] from the union at any time it wishes to do so, and for any reason" (93 Cong. Rec. 4272). In conference, the conferees rejected a provision of the House bill [2] which prohibited expulsion from union membership except under specified conditions, and adopted, in its stead, the proviso to Section 8 (b) (1) (A).[3]

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[2] H. R. 3020, 80th Cong., 1st Sess., Sec. 8 (c) (6).

[3] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 46.

Similarly, while Section 8 (a) (3) of the amended Act bans the closed shop and prohibits union membership from being a condition of employment except in narrow circumstances, it is clear that this does not affect a union's right to control its own membership according to its own standards. The Senate Committee explained (S. Rep. No. 105, 80th Cong., 1st Sess., pp. 20, 21):

> The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. * * * It is to be observed that unions are free to adopt whatever membership provisions they desire * * *.

And Senator Taft stated (93 Cong. Rec. 4193):

> The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members.

Accordingly, regardless of its reason, a labor organization's exertion of union discipline, when exercised only by internal regulation of the terms of the acquisition and retention of membership, is excluded by the proviso to Section 8 (b) (1) (A) from being an unfair labor practice. As in this case, if a membership rule is used to enforce a member's compliance with a union policy which has an unlawful purpose, the congressional scheme is to suppress the policy directly, and thereby eliminate

it, but to leave untouched a union's control over its membership, and to that extent avoid intermeddling in its internal affairs.

Contrary to petitioner's claim (Pet., pp. 12, 14-15), there is no conflict between the decision below and this Court's decision in *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469. The latter case was concerned with evaluating whether an employer's statement was coercive or was within the area of free speech. In subject matter, relevant statutory provisions, and competing considerations, it is wholly unlike the decision below, and we believe it has no more to do with the present case than any other decision that might be selected at random.[4] No other conflict exists and none is claimed, nor has the interpretation of the proviso to Section 8 (b) (1) (A) presented a substantial or recurrent problem in the administration of the Act.

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[4] Although not wholly clear, petitioner appears to have abandoned its contention that the failure of the ITU to bargain in good faith with the employers constitutes, of itself, restraint and coercion of employees in violation of Section 8 (b) (1) (A). This contention, rejected by the Board (R. 136-139) and the court below (R. 3083), is entirely insubstantial.

CONCLUSION

For the reasons stated, we do not oppose the grant of the petition for a writ of certiorari limited to the question of the interpretation of Section 8 (b) (6) of the Act. However, we urge that the petition should be denied with respect to the question of the interpretation of Section 8 (b) (1) (A) of the Act.

Respectfully submitted.

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